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NO. 84-687

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1984

SYBIL BROWN, ANNE CALDWELL AND
SALLY MCRAE
Petitioners,

v.

PUGET SOUND ELECTRICAL APPRENTICESHIP
AND TRAINING TRUST; LOCAL 46,
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS; AND PUGET SOUND
CHAPTER NATIONAL ELECTRICAL
CONTRACTORS ASSOCIATION,
Respondents.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR RESPONDENTS

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12 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

(1) An apprenticeship committee granted veterans an age credit so that veterans, like nonveterans, had eight years in which to apply for apprenticeship. Did the committee violate Title VII by rejecting applications filed by overage female nonveterans who alleged no obstacle to timely application?

(2) Respondents contend that the case does not present an issue concerning the "clearly erroneous" rule.

(3) Did the court lack jurisdiction over one petitioner's claim (not filed with the EEOC) that she was bypassed by admission to an apprenticeship program by a lower-rated male, because that claim was not reasonably related to her earlier EEOC charge that the program wrongly found her overage but permitted veterans of the same age to apply?

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COUNTERSTATEMENT OF THE CASE

Petitioners applied for admission to respondent Joint Apprenticeship and Training Committee's (JATC) commercial electrician program in 1977. The JATC rejected their applications as each applicant was over the program's maximum age level of age 26 (Appendix, A56-59). At that time, the JATC allowed veterans of either sex to subtract one year from their age for each year of military service, up to a maximum of four years (A52-53). The Special Master found as a fact that "[i]n establishing and maintaining its veterans age credit policy, the JATC relied in good faith on policies endorsed by the federal government" (A53). On three occasions from 1966 to 1971, the federal Bureau of Apprenticeship Training had authorized exemption from maximum age limitations for veterans by apprenticeship programs.

All three petitioners filed charges with the Equal Employment Opportunity Commission (EEOC). Petitioner McRae alleged in her charge (A12-13):

> The respondent discriminates against women in the administration of, and in admission to, the apprenticeship program. I am a woman. On August 16, 1977, I tried to apply for the commercial electrical apprenticeship program. My application was rejected because I was over 25 years old and had no military service. I believe this age requirement is discriminatory.

The JATC dropped its veterans age credit in 1978 and allowed applicants to apply up through age 29. Petitioners Brown and Caldwell re-applied in 1978 to the JATC's commercial electrician program and were admitted. Petitioner McRae applied to and was accepted into the JATC's residential electrician program. She also re-applied in 1978 to the construction program. She was placed on the waiting list. Later, a male below her on the waiting list was admitted to the program. McRae did not file an EEOC charge concerning this event.

After trial, a Special Master found the JATC liable under Title VII for Petitioners' rejections. Liability was based on the Special Master's view that the veterans age credit had a disparate impact on women. Intent was deemed irrelevant (A78-80). The Special Master denied the JATC's jurisdictional objection to McRae's 1978 claim of discriminatory bypass and found the JATC liable for that as well. The Special Master's report was approved by the district court and judgment was entered.

The court of appeals reversed in all respects. It concluded that the disparate impact analysis was inapplicable to the facts presented (A19, 22). Petitioners were not harmed by the veterans age credit as they, like veterans, had eight effective years to apply to the program (A17-18, 22). The court of appeals also found that it had no jurisdiction to resolve McRae's separate 1978 claim. That claim, on which no EEOC charge was filed, was not reasonably related to her 1977 EEOC charge challenging the veterans age credit (A11-14).

SUMMARY OF ARGUMENT

Petitioners were not harmed by the JATC's veterans age credit. Their applications were rejected simply because they waited more than the given eight years to apply. Veterans too had eight years to apply — eight civilian years during which they had the opportunity to apply. Petitioners neither alleged nor proved any obstacle to their applying on a timely basis. Petitioners therefore have no standing to raise the concerns of women who raised children during the relevant time period or of other groups whose circumstances arguably limited their opportunity to apply. Hence, no substantial federal question is presented on the facts of this case.

Careful reading of the circuit court's opinion reveals that the appellate court found as a matter of law that the disparate impact test was inapplicable. The court did not overturn any

findings of fact regarding impact. It is academic to this case whether the circuits conflict concerning the scope of review for finding of disparate impact.

Rejection of McRae's 1978 claim was not based on her mistaken selection of a theory of liability. Her applications were denied in two separate years for two separate reasons. No decision of this Court excuses a plaintiff's statutory obligation to file a charge with the EEOC before suit when suit is based on a claim which bears no reasonable relation to a matter which was presented to the EEOC.

ARGUMENT

I. No imporant federal question is presented, as petitioners, who failed to apply for admission during an eight year period, were not harmed by an age credit for veterans which equalized veterans' opportunity to apply.

Contrary to petitioners' argument, this is not a veterans preference case. Petitioners had eight years to apply for admission to the apprenticeship program, from their eighteenth to their twenty-sixth birthdays. They neither alleged nor proved any barrier, sex-linked or otherwise, to applying before age 26. Each merely failed to timely apply. By operation of the JATC's veterans age credit, veterans had up to eight years during which they were in the civilian labor market to apply. While it is true that a twenty-seven year old veteran could apply, it is not true that that veteran had more of an opportunity than petitioners to apply. By definition, a person cannot serve an apprenticeship while he or she is in the military. Using this analysis (A17-18), the court of appeals found that "the existence of the age credit had no adverse effect whatsoever on women" or on Petitioners (A18, 22).

The veterans age credit at issue here is a far cry from the veterans preference which petitioners argue should be reviewed by this Court. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979) involved an absolute preference for veterans for state jobs. Had the JATC given bonus points to veteran applicants, the issue posed by petitioners would be joined. On the facts of this case, the Court cannot reach the relationship between veteran preferences and Title VII on which the Petition is premised.

Petitioners further have no standing to argue that the veterans age credit is unfair because it singles out only one of life's vicissitudes. Petitioner did not plead that they were barred from applying earlier due to pregnancy or childbearing responsibilities. Other factors suggested by petitioners, such as civilian employment in hospitals, enrollment in college, or residence in other locales, are not sex-based. As petitioners do not belong to the groups for whom they advance their argument, they lack standing. *Compare Coopersmith v. Roudebush*, 517 F.2d 818, 823 (D.C. Cir. 1975) (plaintiff had completed childrearing and resumed full-time employment; no standing to challenge employment preference for recent legal experience).

II. This petition does not squarely present a conflict between the circuits concerning the "clearly erroneous" rule, as the court of appeals found the disparate impact test inapplicable and did not overturn any fact findings concerning impact.

Quoting one sentence from the appellate opinion, petitioners represent that the court of appeals "overturned the district court's finding of disparate impact without giving it the deference required by the 'clearly erroneous' rule" (Petition, 6). Petitioners fail to advise the Court that the court of appeals found the disparate impact test inapplicable. At A19, the court of appeals states:

> Contrary to Appellee's contention, the disparate impact analysis developed in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) is inapplicable here.

And at A22, the court concluded:

> We therefore hold that the district court erroneously applied a disparate impact analysis to these facts.

At no point did the court of appeals overturn a fact finding concerning impact. The court instead found the analysis itself legally improper.

This Court has recognized that not every set of facts is susceptible to analysis under the disparate impact test. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805-806 (1973) rejected the notion that an employer's policy of denying re-employment to those who engaged in unlawful conduct against it came under the impact rationale. Lower courts as well have rejected impact analysis for certain cases. *See, e.g., Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496, 500 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (anti-nepotism rule). The court of appeals here found the impact test inapplicable due to its view that petitioners were not harmed by the veterans age credit. Hence, this case does not present the conflict concerning the "clearly erroneous" rule suggested by Petitioners.

III. McRae's 1978 claim was rejected not because she chose the wrong legal theory for her EEOC charge but because the rejection of her second application, over which she filed no charge, was unrelated to her challenge to the veterans age credit.

Petitioner McRae filed an EEOC charge which, in its factual allegations, addressed her claim that she was wrongly rejected

due to age because of the veterans age credit. Over one year later, her second application to the JATC was not acted upon even though a lower rated male was admitted off the waiting list. Since the JATC had lifted its age limit by that time, McRae was within the permissible age limit. The JATC's second action, in 1978, had nothing to do with age and nothing to do with its eliminated veterans age credit. McRae sued on the 1978 denial even though she filed no EEOC charge concerning it.

The court of appeals sustained the JATC's jurisdictional objection to consideration of McRae's 1978 claim. In so doing, it applied a rule that (A11):

> When an employee seeks judicial relief for incidents not listed in his original EEOC charge, a federal court may assume jurisdiction over the new claims if they are "like or reasonably related to the allegations of the EEOC charge." [citation omitted]

The rule is an exception to the statutory requirement that a person file a charge with the EEOC and receive a right-to-sue letter before filing suit. 42 U.S.C. § 2000e-5(f)(1). The court of appeals also stated that a charging party could not "bypass the administrative process" where the second claim is "*not* so closely related that the agency action would be redundant" (A-12) (emphasis in original).

The court of appeals held that McRae's 1978 claim of discriminatory bypass was not related to her 1977 claim and EEOC charge contesting her rejection due to age (A13):

> Any investigation of whether McRae's application was rejected as the result of disparate *impact* would not have encompassed her subsequent claim that when she reapplied to the program she was subjected to *intentional* sex discrimination. [emphasis in original]

Petitioner McRae argues that her 1978 claim was rejected because she failed to elect the proper legal theory at the charge filing stage (Petition, 8). She misreads the opinion. The court of appeals focused on what the EEOC would have discovered and attempted to conciliate when processing her EEOC charge. It found that the agency would not have reviewed her 1978 claim in the context of investigating the veterans age credit issue. It is true that the court spoke in terms of "impact" and "intention." But these references, in the context of the rationale for its decision, were shorthand. McRae's 1978 claim was rejected because it was too unrelated to her 1977 charge to assume that the EEOC could have performed the investigatory and conciliatory role assigned to it by Congress.

There is nothing hypertechnical about insisting that a claimant file an EEOC charge on a new matter even though she filed earlier against the same respondent on another matter. "Procedural niceties" have been criticized where the procedural error had no effect on how the charge was processed. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). Here, Petitioner McRae avoided the agency altogether.

CONCLUSION

For the foregoing reasons, the Court should deny the writ of certiorari.

DATED this 21st day of November, 1984.

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